

April 2021 Aviation Regulatory Update

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HOUSE DEMOCRATS INTRODUCE BILL TO REQUIRE DOT TO DEVELOP NATIONAL AVIATION EMERGENCY PLAN IN RESPONSE TO COVID-19 CRISIS

On April 22, 2021, a group including House Transportation Committee Chair, Peter DeFazio and Representative Rick Larsen introduced the *Healthy Flights Act of 2021*, which sets forth uniform requirements for passengers and airline and airport workers, and seeks to prepare U.S. aviation stakeholders for future pandemics and epidemics through the development of a national preparedness plan. The bill comes as the current federal mask mandate for planes and airports is set to expire on May 11, 2021 and airline and affiliated unions have expressed support for having the mandate extended. Some key features of this law are:

- Clarifies FAA's authority to impose any requirements on air travel necessary to protect the health and safety of airline workers and passengers during public health emergencies;
- Requires passengers to wear masks on board aircraft and within airports, and also requires issuance of masks and other protective equipment to airline employees and certain FAA employees during any public health emergency that is caused by a respiratory disease;
- Requires the DOT to develop a National Aviation Preparedness Plan to respond to epidemics or pandemics;
- Calls for a study on transmission of infectious diseases in airplane cabins;
- Creates an FAA Center of Excellence on Infectious Disease Response and Prevention in Aviation to advise the FAA Administrator on infectious diseases and air travel; and
- Amends airline passenger briefing requirements to enumerate new federal guidelines during pandemics and subsequent penalties for non-compliance.

Various airport industry trade groups and aviation workers unions have already shown support for the Healthy Flights Act as the COVID-19 pandemic has illustrated the urgent need for a plan to protect aviation crews, employees and passengers aboard aircraft. The bill is still currently being considered in the House as it has yet to be taken up in the committee on Transportation and Infrastructure.

FAA FINAL UAS RULE BECOMES EFFECTIVE

On April 21, 2021, the FAA's final UAS rules on the Operation of Small UAS Over People and Remote ID became effective.

The "**Operation of Small Unmanned Aircraft Systems Over People**" final rule, [available here](#), allows expanded routine operations of small UAS over people without a waiver or exemption, provided that the operation meets the requirements of one of four operational categories. The first three categories are based on the risk of injury they present to people on

the ground, while the fourth category is based on the small UAS having an airworthiness certificate. The rule also allows routine operations of small UAS at night under two conditions: (1) the UAS pilot must complete a current initial knowledge test and recurrent training to ensure familiarity with the risks and appropriate mitigations for nighttime operations; (2) the small unmanned aircraft must have lighted anti-collision lighting visible for at least three statute miles that has a flash rate sufficient to avoid a collision.

The “**Remote Identification of Unmanned Aircraft**” final rule, [available here](#), provides for new remote identification operational requirements for UAS. Operators can comply by any of the following methods: (1) by operating a standard remote identification UAS that broadcasts identification, location, and performance information of the unmanned aircraft and control station; (2) by operating a UAS with a remote identification broadcast module, where the broadcast module broadcasts identification, location, and take-off information, and may be a separate device that is attached to a UAS, or a built in feature; and (3) by operating UAS without any remote identification equipment, when the UAS is operated at specific FAA-recognized identification areas.

FAA PROPOSES CIVIL PENALTIES FOR INCIDENTS INVOLVING THREE PASSENGERS WHO ALLEGEDLY INTERFERED WITH FLIGHT ATTENDANTS

On April 27, 2021, the FAA announced it was issuing civil penalties, ranging from \$14,500 to \$31,750, in response to three incidents that occurred in January 2021 in which passengers allegedly interfered with and, in two cases, assaulted flight attendants. Federal law currently requires that passengers refrain from interfering with aircraft crew and strictly prohibits threatening to assault, or actually physically assaulting, aircraft crew or any other passengers on board an aircraft. The FAA has strictly enforced a zero-tolerance policy in these cases following the events at the U.S. Capitol on January 6, 2021.

Two of these cases involved passengers aboard the same JetBlue Airways flight from Haiti to Boston, MA. In both instances, the Administration alleged that the passenger drank personal alcohol, which the airline did not provide, and then proceeded to act in a disruptive and combative manner once flight attendants intervened following complaints from several other passengers about the passengers’ behavior. Both passengers ended up having to be escorted off the plane by police.

Similarly, in the third case, a passenger on a SkyWest Airlines flight from Yuma, AZ to Dallas, TX allegedly drank personal alcohol, which the airline did not provide, and proceeded to repeatedly disturb other passengers and dismissed multiple requests by flight attendants and off-duty law enforcement officers to remain in his seat.

DC COURT OF APPEALS UPHOLDS FAA EMERGENCY CEASE AND DESIST ORDER

On April 2, 2021, the U.S. Court of Appeals for the D.C. Circuit issued a decision on a Petition for Review in the case of *Warbird Adventures Inc. v. Federal Aviation Administration*, denying Warbird Adventure’s request for the court to overturn FAA’s emergency cease and desist order. Warbird Adventures, a company in Kissimmee, FL, offers flight instruction in vintage and WWII military aircraft, such as the North American T-6 Texan and the Curtiss-Wright model P-40N Warhawk. In July 2020, the FAA issued an emergency cease and desist order, prohibiting Warbird from providing paid flight instruction in the P-40N because it was not certified for that purpose. In the cease and desist order, the FAA explained that it had previously advised Warbird that providing flight instruction in a limited category aircraft constituted a violation of 14 C.F.R. § 91.315, as it prohibits “operat[ing] a limited category civil aircraft carrying persons or property for compensation or hire.” This is based on the FAA’s “Morris Interpretation” issued in 2014 which states that no person can provide flight training for hire in a limited category aircraft unless they obtain an exemption under 14 C.F.R. Part 11. The order also provided that any instructor paid to provide flight training “is operating the aircraft for compensation or hire,” regardless of whether the instructor is acting as a pilot in command.

In its Petition for Review, Warbird first challenged FAA's interpretation of § 91.315, claiming that the court was not required to defer to the FAA's Morris Interpretation because the plain language of the regulation merely prohibits "carrying persons or property for compensation or hire" and importantly does not list "flight training" or "student instruction" among its prohibitions. Furthermore, Warbird argued that the Morris Interpretation conflicts with prior FAA legal interpretations, specifically a 1995 interpretation that states that the "compensation a certificated flight instructor receives for flight instruction is not compensation for piloting the aircraft but is rather compensation for the instruction." Finally, Warbird also challenged the emergency nature of the order, claiming that FAA had not provided sufficient evidence to show that an actual emergency existed.

The court, however, disagreed with Warbird's arguments on both points. The court took a very strict view of the language, finding that student pilots are "people" being "carried" in an aircraft "for compensation", and that FAA's failure to include an exception for flight instruction under § 91.315 was intentional based on exemptions that were included in other similar regulations, such as § 91.313. The court also found that FAA's determination of an emergency was warranted given Warbird's failure to heed FAA's initial warnings prior to the emergency order, and the fact that Warbird continued to advertise flights in the P-40N after FAA initiated administrative action. For these reasons, the court denied Warbird's petition and upheld FAA's emergency cease and desist order.

KOBE BRYANT & GIANNA BRYANT HELICOPTER SAFETY ACT INTRODUCED IN SENATE

On January 25, 2021, Senator Dianne Feinstein and Representative Brad Sherman introduced the Kobe Bryant & Gianna Bryant Helicopter Safety Act (S.36) in the U.S. Senate. If passed, the bill will require the FAA to issue regulations to implement National Transportation Safety Board (NTSB) recommendations for crash-resistant systems with respect to both existing and new U.S. registered turbine-powered rotorcraft (i.e. helicopters) that are equipped to carry six or more passengers. Specifically, the law will require that all helicopters that carry six or more passengers be equipped with a flight data recorder, a cockpit voice recorder, and a terrain awareness and warning system. It is important to note however, that the FAA may still exempt any civilian helicopter from one or more of the equipment requirements.

In 2006, the NTSB recommended that both terrain awareness equipment and warning systems be deemed mandatory equipment on all helicopters, but no further concrete steps were taken to make the equipment mandatory under the law. In fact, to date the FAA only requires that such equipment be present on helicopter air ambulances. The Act is still currently under consideration in the Senate.

DHS TERMINATES CERTAIN ARRIVAL RESTRICTIONS RELATED TO EBOLA VIRUS

On April 29, 2021, the U.S. Department of Homeland Security (DHS) announced that it would be terminating arrival restrictions for flights to the U.S. carrying persons who have recently traveled from, or were otherwise present within, the Democratic Republic of the Congo (DRC). These arrival restrictions were initiated due to outbreaks of Ebola Virus Disease in the DRC and in the Republic of Guinea, and required these flights to land at a limited number of designated airports in the U.S. However, the DHS announcement made clear that the arrival restrictions for flights to the U.S. carrying persons who have recently traveled from, or were otherwise present within, the Republic of Guinea remain in effect.

FAA ISSUES NEW ADVISORY CIRCULAR ON PREFLIGHT PROCEDURES

On March 15, 2021, the FAA issued a new Advisory Circular (AC 91-92), Pilot's Guide to a Preflight Briefing, [available here](#). The purpose of the AC is to provide an "educational roadmap" to assist pilot's with understanding all requirements for developing preflight briefings, which includes: flight planning; weather interpretation; risk identification/mitigation skills; and additional technology options like ADS-B. The AC also describes the requirements for complying with 14 CFR § 91.103, which requires pilots to, "become familiar with all available information concerning that flight". The AC provides

numerous additional resources for pilots; and describes best operating processes for preflight actions, developing various types of briefings, and every other aspect of flight planning. We also note, that FAA made it clear that the information in the AC does not have the force and effect of law and is not meant to bind the public in any way. Rather, the AC was issued to provide clarity regarding existing requirements under the law or agency policies. Finally, while the AC is applicable to “all pilots, flight instructors, and operators” the emphasis of the AC was for Part 91 operations.

This Aviation Regulatory Update is intended to keep readers current on developments in the law. It is not intended to be legal advice. If you have any questions, please contact author Evelyn Sahr at 202.659.6622 or esahr@eckertseamans.com; Drew Derco at 202-659-6665 or dderco@eckertseamans.com; or Andy Orr at 202-659-6625 or aorr@eckertseamans.com or any other attorney at Eckert Seamans with whom you have been working.